No. 91-636

In the Supreme Court of the United States

OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC., PETITIONER

v.

MICHIGAN DEPARTMENT OF PUBLIC RESOURCES, ET AL., RESPONDENTS

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Michigan law prohibits waste disposal facilities from receiving waste generated outside the county in which they are located unless they obtain permission to do so from the county, 67 percent of the municipalities within that county, and the Michigan Department of Natural Resources. St. Clair County does not permit petitioner—a company that owns and operates a waste disposal facility in St. Clair County—to dispose of out-of-county waste. The question presented is:

Whether the Michigan law either facially or as applied to petitioner discriminates against interstate commerce in waste in violation of the Commerce Clause.

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INTEREST OF THE AMICUS CURIAE

National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 2700 member companies are engaged in the full spectrum of waste management services. NSWMA's members include collectors and transporters of solid and hazardous waste, operators of solid and hazardous waste treatment, storage, and disposal facilities, waste recyclers, manufacturers and distributors of waste management equipment, and firms providing legal, financial, and consulting services to the waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.

NSWMA represents the interests of the waste management industry in judicial, legislative, and administrative forums. One threat to which the industry is perpetually subject is state and local efforts to prevent the interstate movement of waste for storage, treatment, disposal, or recycling. An increasingly popular means of accomplishing this purpose is to ban disposal of out-of-county waste. Because bans on out-of-county waste necessarily obstruct the interstate movement of waste, NSWMA's members are directly and adversely affected by such provisions. They accordingly have a strong interest in presenting their views on the constitutionality of out-of-county waste bans in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

One bedrock principle is clear from this Court's Commerce Clause jurisprudence: state and local governments may not discriminate against articles of commerce from other states. Through vigilant enforcement of this principle, the Court has helped realize the goal of the Fram-

ers—a national economy unfettered by efforts of state and local governments to gain a competitive advantage for their residents.

In one area, however, state and local governments doggedly persist in flouting the antidiscrimination principle that is at the heart of Commerce Clause doctrine. When it comes to waste—whether municipal, hazardous, medical, or radioactive—state and local governments have used myriad means to try to obstruct the interstate market that has prevailed for every other article of commerce.

One increasingly popular means of disrupting the interstate market in waste is to impose disparate burdens on waste generated outside the county in which the waste disposal facility is located ("out-of-county waste"). These burdens necessarily are borne by *all* out-of-state waste, even though they also are borne by some in-state waste as well. The Michigan statute at issue here is of this sort.

As applied to petitioner, the Michigan law operates as an absolute ban on disposal of out-of-state waste in St. Clair County. Moreover, even ignoring St. Clair County's actions, the state statute necessarily relegates out-of-state waste to second-class status. *No* out-of-state waste may be disposed of anywhere in Michigan without first surviving a multi-tiered authorization process. By contrast, *all* Michigan waste may be disposed of in at least one Michigan county—the one in which it is generated—without undergoing any approval process at all. And, because the statute gives counties an absolute veto over the disposal of out-of-county waste, each county can extract favorable disposal terms for its own residents. The conclusion that Michigan thereby has conferred upon its residents a "preferred right of access over consumers in other States to natural resources located within its borders" (*City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978)) is inescapable.

The court below concluded that because the Michigan statute burdens some in-state waste in addition to all out-of-state waste, it does not discriminate against interstate commerce in waste. That conclusion is at odds with over one hundred years of this Court's precedents, which make clear that legislation drawn along geographic lines that burdens all or substantially all interstate commerce is no less unconstitutional because it also burdens some intrastate commerce. See, *e.g.*, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 n.4 (1951); *Brimmer* v. *Rebman*, 138 U.S. 78, 83 (1891).

Because the Michigan statute discriminates against interstate commerce in waste, it must be struck down unless its provisions are the least discriminatory means of achieving some legitimate governmental interest. They plainly are not. Respondents contend that the provisions at issue are necessary to enable counties to "identify" the source and amount of waste to be disposed of within their boundaries. However, giving counties an absolute veto power over out-of-state waste hardly is necessary to achieve this identification goal.

Nor is the imposition of discriminatory burdens an acceptable means of satisfying either respondents' general health and safety concerns or their goal of preserving waste disposal capacity. This Court so held in *City of Philadelphia*, *supra*.

Finally, there are a range of less discriminatory means for counties to meet their state-imposed obligation to ensure waste disposal capacity for county-generated waste. For one thing, counties could enter into long-term requirement contracts. Alternatively, they conceivably could operate their own waste disposal facilities. Several lower courts have held that they then may confer a preference upon county-generated waste.

Because the disparate burdens effected by the Michigan statute are not the least discriminatory means of achiev-

ing any legitimate governmental objective, the provisions at issue violate the Commerce Clause. The judgment of the court of appeals accordingly must be reversed.

ARGUMENT

I. AN INTERSTATE MARKET FOR WASTE DISPOSAL IS ESSENTIAL TO ENSURE THE SAFE AND EFFICIENT MANAGEMENT OF WASTE

A. The Market For Municipal Waste Disposal Is Necessarily Interstate.

Our nation generates about 180 million tons of municipal solid waste each year. *Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 80 (1991) (statement of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response, Environmental Protection Agency) (hereinafter *House Hearings*).[1] Most of this waste is disposed of within the state in which it is generated. Approximately 15 million tons, or eight percent, however, move in a well-established interstate market for waste disposal. *Id.* at 81.

A recent study conducted by the NSWMA found 133 different waste "interactions" among the lower 48 states and the District of Columbia, with each interaction reflecting a regular movement of waste between two jurisdictions. *House Hearings* at 263, 290 (statement of Allen Moore, President, NSWMA). More than two-thirds of the states participate in this interstate market as

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[1] Municipal solid waste is defined generally as "residential[] and commercial solid waste generated within a community." 40 C.F.R. § 241.101(k). Although we focus here on the market for municipal waste, it bears noting that the market for hazardous waste (as well as radioactive waste and medical waste) is even more plainly interstate in scope. See *House Hearings* at 269-274 (Moore); NSWMA, *Interchange of Hazardous Waste Management Services Among States* (Dec. 31, 1990). A copy of the latter document has been lodged with the Clerk of the Court.

both importer and exporter. *Id.* at 263, 291.[2] Indeed, in the past few years Michigan has imported municipal waste from five states and exported it to three states.[3]

Several factors have contributed to the development of the interstate market for waste disposal. For one thing, many of the Nation's population centers (*e.g.*, Cincinnati, Toledo, St. Louis, Louisville, Chicago, and Kansas City) overlap two or three states. An out-of-state facility thus is often the closest and most efficient disposal option for many communities. Over eighty percent of the interstate commerce in municipal waste is not the result of states sending their waste to far off communities, but is instead the product of the natural development of regional "wastesheds." NSWMA, *Special Report: Interstate Movement of Municipal Solid Waste* 4 (Oct. 1990).[4]

The economic benefits available to a state in which a disposal site is located also contribute to the interstate movement of municipal waste. Waste management facilities provide an important resource for some communities, enabling them to sustain a profitable industry, provide jobs to their residents, and broaden their tax base. *House Hearings* at 252, 260 (Moore). Thus, it is increasingly common for host communities to play a major role in planning and designing state-of-the-art facilities, as well as to receive host fees based on the volumes of waste disposed of. *Id.* at 260.

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[2] Of the 48 contiguous states, 38 are both importers and exporters. Five states and the District of Columbia are exporters only; four states are importers only; and only one state has no known interstate activity. *House Hearings* at 283-291 (Moore).

[3] Specifically, it has imported waste from Illinois, Indiana, New Jersey, Ohio, and Pennsylvania and exported waste to Illinois, Indiana, and Ohio. *House Hearings* at 285 (Moore).

[4] A copy of this report has been lodged with the Clerk of the Court.

In addition, space limitations (*e.g.*, in Washington, D.C. or Manhattan), high land prices, and unfavorable hydrogeological conditions, make it impossible or impractical to establish a safe waste disposal facility in some communities. Thus, for example, localities with high water tables or permeable soils traditionally have been poor candidates for disposal facilities. The location restrictions contained in the municipal landfill regulations recently promulgated by the EPA (see 40 C.F.R. §§ 258.10-258.16)[5] will likely increase the number of communities that are unable to site their own disposal facilities. For many such communities, the interstate market is now and will remain an essential element of waste disposal planning. *House Hearings* at 260 (Moore).

The desire to utilize economies of scale in the development of new environmentally protective technologies provides a final reason for the interstate market. Many communities are too small to support a state-of-the-art disposal facility by themselves. Only by combining with other communities (both within and outside the state) can they provide the volume of waste needed to make such a facility cost-justified. *House Hearings* at 258-259 (Moore). This was the rationale for the regional landfill whose operator recently successfully challenged a Georgia county's ban on out-of-county waste. See *Diamond Waste, Inc.* v. *Monroe County*, 939 F.2d 941, 943 (11th Cir. 1991).

B. State And Local Efforts To Exclude Out-of-State Waste Have Serious Adverse Consequences.

The interstate waste disposal market is under attack. In response to the growing threat of a disposal capacity shortage (see *House Hearings* at 80 (Clay)), many states,

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[5] The volume of the Code of Federal Regulations containing the municipal landfill regulations has not yet been published. These regulations may be found at 56 Fed. Reg. 51,016-51,039 (Oct. 9, 1991). For brevity's sake, we will refer to these regulations by section number.

like Michigan, have tried to solve the waste disposal problem by cutting themselves off from the rest of the Nation and enacting laws that close their borders to waste generated by residents of other states. This Court's decision in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), held unconstitutional a state statute flatly banning disposal of any out-of-state waste. States and localities are turning to other, slightly more subtle, measures in order to accomplish the same result.

For example, some states have taxed disposal of out-of-state waste at rates higher than those imposed on in-state waste. Almost all of those taxes have been declared unconstitutional. See, *e.g.*, *National Solid Waste Management Ass'n* v. *Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991); *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990). But see *Chemical Waste Management, Inc.* v. *Hunt*, 584 So. 2d 1367 (Ala. 1991) (upholding discriminatory tax on out-of-state waste disposed of at commercial hazardous waste facilities), cert. granted, No. 91-471 (Jan. 27, 1992). Many other states recently have considered enacting similar provisions. See NSWMA, *Federal/State Issues Under RCRA* 1-11 (Jan. 1992).[6]

Perhaps because the courts repeatedly have struck down statutes that expressly discriminate against out-of-state waste, many state and local governments have turned to alternative methods of accomplishing the same goal. In particular, bans on the disposal of out-of-county waste such as the statute at issue here have been proliferating at an alarming rate. In addition to Michigan's, we are aware of 12 other bans that have been litigated to decision.[7] Moreover, Arkansas, Kentucky, and Montana have

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[6] A copy of this document has been lodged with the Clerk of the Court.

[7] See *Diamond Waste, supra* (striking down county's ban on disposal of out-of-county municipal waste); *Evergreen Waste Sys., Inc.* v. *Metropolitan Serv. Dist.* 820 F.2d 1482 (9th Cir. 1987)

enacted laws that impose disparate burdens on out-of-county waste that have not yet been subject to judicial review. *Federal/State Issues* at 2, 4, 6. And bills that would permit counties to ban or disproportionately tax disposal of out-of-county waste are pending in Arizona, New Jersey, and Oregon.[8] Finally, the Pennsylvania General Assembly now is considering a statute (HB 2313) that would divide Pennsylvania into four multi-

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(upholding ordinance that limits use of municipally owned facility to generators in a three-county region); *Northeast Sanitary Landfill, Inc.* v. *South Carolina Dep't of Health & Environmental Control*, No. 3-90-2296-17 (D.S.C. Jan. 3, 1992) (striking down South Carolina's regulations authorizing out-of-county waste bans); *Medical Waste Assocs. Ltd. Partnership* v. *Mayor and Counsel of the City of Baltimore*, No. S 91-1547 (D. Md. Aug. 29, 1991) (upholding ordinance limiting use of privately owned incinerators to medical waste generated in three-county area); *Omni Group Farms, Inc.* v. *County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991) (upholding two local laws that bar disposal of out-of-county waste); *BFI Medical Waste Sys., Inc.* v. *Whatcom County*, 756 F. Supp. 480, 485 (W.D. Wash. 1991) (striking down ordinance barring disposal of out-of-county medical waste); *County of Washington* v. *Casella Waste Management, Inc.*, 1990 WL 208709 (N.D.N.Y. Dec. 5, 1990) (upholding ordinance barring disposal of out-of-county waste); *Browning-Ferris, Inc.* v. *Anne Arundel County*, 438 A.2d 269, 271-272 (Md. 1981) (striking down ordinance barring disposal of out-of-county hazardous waste); *Borough of Glassboro* v. *Gloucester County Bd. of Chosen Freeholders*, 495 A.2d 49 (N.J.), cert. denied, 474 U.S. 1008 (1985) (upholding injunction limiting use of landfill to three counties); *City of Elizabeth* v. *State of New Jersey Dep't of Environmental Protection*, 486 A.2d 356, 361 (N.J. Super. Ct. App. Div. 1984) (upholding state regulation that effectively barred landfill from receiving out-of-county waste); *Monroe-Livingston Sanitary Landfill, Inc.* v. *Town of Caledonia*, 417 N.E.2d 78 (N.Y. 1980) (upholding ordinance prohibiting disposal of out-of-town waste without authorization of local officials); *Dutchess Sanitation Serv., Inc.* v. *Town of Plattekill*, 417 N.E.2d 74 (N.Y. 1980) (striking down ordinance prohibiting non-residents from disposing of out-of-town waste).

[8] *Federal/State Issues* at 2, 7, 9. Illinois, Indiana, Kentucky, and Louisiana have considered similar legislation in the recent past. See *id.* at 3, 4, 5.

county regions, and would bar any waste from going in or out of any region for the purpose of disposal. The effect of this legislation would be to close Pennsylvania's borders entirely to out-of-state waste (unless it is being transported *through* Pennsylvania), while allowing in-state waste to be disposed of at facilities located anywhere within large, multi-county regions.

Respondents and other proponents of these measures may believe that they are promoting good waste management both in their own communities—by extending the life of their landfills—and in the communities from which they import waste—by forcing those communities to develop their own waste disposal facilities. That view, however, is quite mistaken.

Such isolationist approaches will not result in the expeditious siting of new waste disposal facilities to replace those no longer available to the exporting community. See *House Hearings* at 299 (statement of Allen Hershkowitz Ph.D. and Olivia Farr, Natural Resources Defense Council). According to the EPA, it takes "many years" to site, design, and construct a waste disposal facility. *Id.* at 81 (Clay). See also *id.* at 302 (Hershkowitz and Farr) (estimating that municipal planners need seven to ten years to design and permit environmentally sound disposal programs). And, as discussed above, many communities possess neither an appropriate site nor the financial resources necessary to develop environmentally sound waste management systems in even that long time frame.

Moreover, the state-of-the-art, environmentally sound disposal facilities required by the EPA's recently enacted municipal landfill regulations will be particularly expensive. These new regulations impose broad operating, design, monitoring, and financial assurance requirements.[9] The risk that state and local governments may

[9] Among other things, operators of landfills generally will have to implement a methane gas monitoring program and install systems

at any time curtail or terminate the flow of interstate waste will be a major deterrent to investment of funds to build new facilities satisfying these requirements. And those facilities that are built are likely to be smaller and less efficient. *House Hearings* at 264 (Moore).

The lack of new sites to replace the capacity lost as a result of bans such as Michigan's will impose great environmental costs upon waste-generating communities. As the federal official responsible for solid waste disposal has observed, disposal in other states often is the only option available for waste generators in many areas. *House Hearings* at 82 (EPA Assistant Administrator Clay). Elimination of this option will increase the pressure on generators and waste collectors in small and poor communities to engage in illegal dumping. *Id.* at 252 (Moore).

Finally, laws like the one at issue here may result in a net loss of disposal capacity to the host community. Many existing facilities were built in reliance on revenue from disposal of out-of-state municipal waste. Losing this revenue could put these facilities out of business if they cannot obtain sufficient funding to meet their operating costs and service their debt. *House Hearings* at 264 (Moore). The increased costs that current operators will incur under the EPA's newly adopted municipal landfill regulations can only exacerbate this problem.

In short, bans on out-of-state waste are a most counterproductive means of addressing the Nation's waste disposal needs. That is why the EPA has opposed such measures. As its Administrator, William Reilly, recently stated in testimony before Congress:

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to prevent run-on and run-off on the active part of the landfill. 40 C.F.R. §§ 258.23, 258.25. New landfills typically will have to use a composite liner. *Id.* § 258.40. Extensive ground water monitoring systems will be required of new and existing landfills on a phased-in basis. *Id.* §§ 258.50-258.55. Finally, operators will have to provide assurance of their financial wherewithal to take corrective action and properly close their facilities. Id. § 258.71-258.74.

> The existing national market in solid waste will continue to be necessary in the short run for effective management of solid waste, while States implement integrated waste management plans. * * * Therefore, we should not create any authorities that operate as a ban on interstate transport of * * * solid * * * waste, thereby inhibiting or restricting development and use of the most appropriate technology for waste treatment or recycling.

Resource Conservation and Recovery Act Amendments of 1991: Hearings Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 102d Cong., 1st Sess., pt. 2, at 496-497 (1991) (hereinafter *Senate Hearings*). The Natural Resources Defense Council and NSWMA also have strongly opposed bans and discriminatory fees. See *House Hearings* at 299-302 (Hershkowitz and Farr), 264-267 (Moore).

As we now explain, the harmful effect that such bans have on the interstate market for waste disposal is not merely a matter of policy; absent congressional authorization, such bans are beyond the constitutional authority of state and local governments.

II. MICHIGAN'S RESTRICTIONS ON THE DISPOSAL OF OUT-OF-COUNTY WASTE DISCRIMINATE AGAINST INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE

A. Absent Congressional Action, The Commerce Clause Bars State And Local Governments From Discriminating Against Articles Of Commerce—Including Waste—That Originate In Other States.

This Court long has recognized that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Indeed, it was to reverse "a drift toward

anarchy and commercial warfare between states" that the Articles of Confederation were discarded in favor of a federal Constitution. *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 533 (1949). The Framers of the Constitution were guided by "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979). "The few simple words of the Commerce Clause" were the principal mechanism for carrying out this overarching purpose. *Id.* at 325.

For over a century this Court has invoked the Commerce Clause to strike down state or local legislation that threatened to promote the very Balkanization that the Framers had intended to forestall. See, *e.g.*, *Wyoming* v. *Oklahoma*, No. 112, Orig. (Jan. 22, 1992) (requirement that Oklahoma utilities obtain at least 10% of their coal from within the state); *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988) (tax preference for in-state ethanol); *City of Philadelphia* v. *New Jersey*, *supra* (statewide ban on disposal of out-of-state municipal waste); *I.M. Darnell & Son* v. *City of Memphis*, 208 U.S. 113 (1908) (tax exemption for in-state agricultural products); *Walling* v. *Michigan*, 116 U.S. 446 (1886) (tax on liquors produced out of state). In so doing, the Court has established a bedrock Commerce Clause principle: "[W]hatever [a state or local government's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *City of Philadelphia*, 437 U.S. at 626-627.

It is thus well established that if a statute discriminates against interstate commerce on its face or in effect, it will be invalidated unless its defenders can meet the "high" burden of showing that it "advances a legitimate

local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy*, 486 U.S. at 278. See also *Wyoming* v. *Oklahoma*, slip op. at 16 (a discriminatory law "will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism") (citation omitted).[10] In conducting such an inquiry, the courts must undertake "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337.

These principles apply with full force to measures designed to obstruct interstate commerce in waste and to reserve waste disposal capacity for use by in-state interests. As this Court explained in the course of striking down New Jersey's ban on out-of-state waste, "[*a*]*ll* objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *City of Philadelphia*, 437 U.S. at 622 (emphasis added). No other rule is tenable. If states were free to discriminate against items of commerce they deem to be "bad," there would be no end to the barriers to interstate trade that could be erected. A state could bar combustible fuels or toxic virgin chemicals from other states while permitting intra-state transportation and use of the same substances. The Framers' vision of a national economy could not long survive.

Similarly, a state or locality may not confer upon its residents a preferred right of access to a privately-owned waste disposal facility. As this Court explained over eighty years ago in striking down a state's effort to hoard natural gas for its own citizens:

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[10] The Court also has indicated that a finding of discriminatory purpose can result in a law's invalidation. See, *e.g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984). Although out-of-county waste bans typically are motivated by an intent to bar out-of-state waste, the Court need not divine the purpose underlying the statute at issue here because that statute plainly discriminates on its face and in its practical operation.

> If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. * * * To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. * * * [The welfare] of each state is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States.

West v. *Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911). See also *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982) (electric power); *Hughes*, *supra* (minnows); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) (gas). Privately-owned waste disposal capacity—which is nothing more than another "natural resource" (see *City of Philadelphia*, 437 U.S. at 627)—cannot be reserved for use by the residents of a state any more than privately-owned coal, timber, or gas.

Notwithstanding these well-established principles, the court below concluded that the Michigan statute does not discriminate against interstate commerce in waste and therefore refused to subject the statute to "the strictest scrutiny," instead upholding the law under the balancing test set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As we now explain, the court of appeals erred in scrutinizing the Michigan provisions at issue here under the more lenient *Pike* test. Those provisions plainly discriminate against out-of-state waste, both facially and as applied to petitioner in this case.[11]

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[11] The term "facially" has two distinct meanings in Commerce Clause cases, both of which are applicable in this case. First, it refers to the kind of challenge being pursued. Here, petitioner has pursued both facial and "as applied" challenges. Second, within the category of facial challenges, a statute can be subjected to heightened scrutiny if it discriminates on its face—*i.e.*, in its

B. As Applied To Petitioner, The Michigan Statute Discriminates Against Out-Of-State Waste.

1. *The Michigan statute operates as an absolute bar against the disposal of out-of-state waste in petitioner's disposal facility.*

The Michigan statute at issue here prohibits disposal facilities from receiving waste generated in other counties unless such waste "is explicitly authorized in the approved county solid waste management plan." Mich. Comp. Laws Ann. § 299.413a. In order to be included in the approved county plan, the receipt of such waste must be approved by the county, two-thirds of the municipalities within the county, and the Michigan Department of Natural Resources. *Id.* §§ 299.426, 299.428, 299.429, 299.432. Thus, a privately owned and operated disposal facility can be barred from receiving out-of-county waste generally or some subset of out-of-county waste (*e.g.*, out-of-state waste) by the county in which it is located *or* by 34 percent of the municipalities *or* by the State.

The management plan for St. Clair County—the county in which petitioner's privately owned and operated disposal facility is located—does not permit disposal of out-of-county waste.[12] Thus, as applied to petitioner, the Michigan statute operates no differently than if it said: "No waste disposal facility located in St. Clair County shall accept for disposal solid waste that is not generated in St. Clair County." And, because *by definition* no out-of-state waste is generated within St. Clair County, the

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express terms—or in its practical operation. Here, the claim is that the statute discriminates both on its face and in its practical operation (much like the claim in *Wyoming* v. *Oklahoma*, *supra*).

[12] Indeed, petitioner sought authorization to dispose of out-of-state waste and, in the words of the court below (Pet. App. 3a), that request was "denied promptly" by the County.

statute, as applied to petitioner in this case, operates as an absolute bar against the disposal of such waste.[13]

2. *Bans on disposal of out-of-county waste discriminate against interstate commerce in waste.*

A long line of this Court's precedents establish that legislation that prohibits importation into a county of articles of commerce from outside that county discriminates against interstate commerce. In *Brimmer* v. *Rebman*, 138 U.S. 78 (1891), the Court struck down a law that prohibited the sale within Virginia of meat slaughtered more than 100 miles from the place of sale unless that meat had first been inspected at the place of sale at a fee of one cent per pound. The Court observed that the practical effect of this statute was that most in-state meat (because it was sold less than 100 miles from the place of slaughter and was exempt from inspection) gained a substantial competitive advantage over most out-of-state meat, which was slaughtered more than 100 miles from the place of sale in Virginia and therefore had to be inspected and incur the one cent per pound fee. The Court unanimously concluded that the provision was, "for all practical ends, a statute to prevent the citizens of distant States * * * from coming into competition, upon terms of equality, with local dealers in Virginia." *Id.* at 83.

The Court expressly rejected the Commonwealth's effort to save the statute on the ground that any Virginia meat producer who shipped its product more than 100 miles would be burdened to the same extent as out-of-

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[13] As the Court has recognized in holding that the Privileges and Immunities Clause applies with full force to a city's efforts to prefer its own residents over those from outside the city, "[a] person who is not residing in a given State is *ipso facto* not residing in a city within that State. Thus, whether the exercise of a privilege is conditioned on state residency or on municipal residency he will just as surely be excluded." *United Bldg. & Constr. Trades Council* v. *Mayor and Council of the City of Camden*, 465 U.S. 208, 216-217 (1984).

state meat producers who failed to meet the 100-mile cutoff. The Court explained: "'[A] burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.'" 138 U.S. at 83 (quoting *Minnesota* v. *Barber*, 136 U.S. 313, 326 (1890)).

The Court reaffirmed this principle sixty years later in *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951). At issue was a Madison ordinance that barred milk producers from selling milk in that city if that milk was not pasteurized within five miles of the center of the city. Noting that the five-mile limitation completely prevented Illinois producers from competing in the Madison market against Madison producers, the Court stated that "[i]n thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce." *Id.* at 354 (footnote omitted). In so holding, the Court deemed it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354 n.4 (citing *Brimmer*).[14] See also *United Bldg. & Constr. Trades Council*, 465 U.S. at 217-218 (finding it irrelevant for purposes of a Privileges and Immunities Clause challenge to Camden's ordinance conferring a hiring preference upon Camden residents that "New Jersey citizens not residing in Camden

[14] Although the Court did not address the issue expressly, its decision in *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964), is consistent with *Brimmer* and *Dean Milk*. In that case, the Court struck down a Florida statute that gave a massive competitive advantage to milk producers in the four counties comprising the Pensacola Milk Marketing Area. Producers from all of Florida's other counties were as disadvantaged as out-of-state producers, but that did not prompt even a single member of the Court to dissent from its opinion that the statute constituted an unconstitutional "embargo on out-of-state milk." *Id.* at 378.

will be affected by the ordinance as well as out-of-state citizens"); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250 (1974) (one-year residency requirement for receiving non-emergency medical care at county expense violates right of interstate travel notwithstanding fact that requirement burdened intrastate migrants to same extent as interstate migrants).

The provisions at issue here are indistinguishable from those struck down in *Brimmer* and *Dean Milk*. Although Michigan has employed a different geographic delineation—"county" rather than "100 miles" or "five miles"—it has drawn the very distinction found impermissible by this Court, crafting its statute so that *all* interstate commerce is subject to more burdensome regulation. The statute in *Dean Milk* would have been no less discriminatory if it had in terms barred milk pasteurized outside Dane County (the county in which Madison is located). So here, the Michigan statute unquestionably discriminates against interstate commerce.[15]

The Court's more recent decision in *Bacchus Imports*, *supra*, reinforces the conclusion that a law that disfavors out-of-state commerce cannot be saved on the ground that much in-state commerce also is disfavored. The Court there struck down an exemption from Hawaii's liquor tax that was available only to okolehao (a liquor made from ti root) and pineapple wine produced in Hawaii. The

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[15] The County suggests (Br. in Opp. 13) that only a small amount of interstate commerce could be affected by its ban. This Court has made clear, however, that the size or number of out-of-state businesses disfavored by a discriminatory law is irrelevant to the constitutional inquiry. *New Energy Co.*, 486 U.S. at 276. Moreover, the Court assesses the effect of a statute on interstate commerce by considering the effect that would arise if many or every jurisdiction adopted a similar provision. See page 25, *infra*. In that situation, which is what has actually occurred in Michigan (see page 20, *infra*), the broad discriminatory effect of the out-of-county ban is indisputable.

fact that all other alcoholic beverages produced in Hawaii remained subject to the tax was beside the point: "the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products." 468 U.S. at 271.

The rule expressed in *Brimmer*, *Dean Milk*, and *Bacchus Imports* has more than just longevity to recommend it. It also fully accords with the Commerce Clause's principal purpose: making "our economic unit * * * the Nation." *H.P. Hood & Sons*, 336 U.S. at 537. As one commentator has explained in applauding the *Dean Milk* decision:

> As to the fact that the geographical area does not even begin to approximate the State of Wisconsin, but rather approximates the County of Dane, and the fact that many Wisconsin milk companies are excluded from dealing in Madison quite as much as the Illinois company Dean Milk, [Justice] Clark expressly and rightly says that is irrelevant. A government cannot validate discrimination against a protected class (in this case non-Wisconsin firms) simply by subjecting some members of the nonprotected class to the same burden. (A state could not conserve gas by closing gas stations to all blacks and to whites with odd numbered license plates.) It also bears mention that if all the cities in Wisconsin did what Madison has done, then the whole state would be closed in effect to foreign milk. The entire Wisconsin market would be reserved for Wisconsin processors (and incidentally partitioned among them).

Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1230 (1986). Accord Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 80 (1988).

Respondents argue (State Br. in Opp. 35; County Br. in Opp. 19-20) that differential treatment of out-of-county waste does not raise the concern about lack of

political restraint to which this Court has referred in its decisions (see *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940)) because disfavored in-state entities will adequately represent the interests of out-of-state entities. Of course, this "political process" concern is not the only (or even the most) important value underlying the Commerce Clause. See pages 11-12, *supra*. In any event, as Professor Collins has explained:

> In theory, competitors outside the city but within the state provide some political check on protectionism. In practice, however, it is likely that their influence is channeled into creating similar trade duchies in their own cities or counties. * * * There is no reason why cities or other local governments should be excepted from the antidiscrimination rule because of in-state losers.

Richard B. Collins, *supra*, 63 N.Y.U. L. Rev. at 80.

There can be no better proof of Professor Collins's point than the provisions at issue here, which impose "trade duchies" in every county in the State and provide for lowering the barrier to interstate waste only in the unlikely circumstance that one of those duchies explicitly authorizes the receipt of such waste. At this time, none of the 83 duchies has entirely eliminated its barriers to out-of-state waste and fully 75 have continued to bar *all* out-of-state waste.[16] See Pet. Br. 26-27 n.19.

Thus, the Sixth Circuit's conclusion that bans on disposal of out-of-county waste, as distinguished from bans on disposal of out-of-state waste, do not discriminate against interstate commerce is wholly irreconcilable with the principal purpose of the Commerce Clause as well as 100 years of precedent implementing it.

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[16] The remaining 8 have authorized receipt of waste from a limited number of neighboring out-of-state counties.

C. Even In The Absence Of St. Clair County's Refusal To Permit Disposal Of Out-Of-County Waste, The Michigan Statute Discriminates Against Out-Of-State Waste.

Perhaps realizing that, as applied to petitioner, the Michigan statute is indistinguishable from the laws struck down in *Dean Milk* and *Brimmer*, respondents have tried to limit the issue to the facial validity of the statute. See County Br. in Opp. 4; State Br. in Opp. 24.[17] But, even ignoring St. Clair County's actions, the statute plainly discriminates against out-of-state waste.

There is no dispute in this case that the Michigan provisions at issue subject out-of-county waste to a greater regulatory burden than in-county waste. Waste generated in a particular county automatically is eligible for disposal at any disposal facility within that county; waste generated outside the county may *not* be disposed of within the county unless the county authorizes it, 67% of the municipalities within the county concur, and the State then gives its approval.

Nor can there be any doubt that the statute's burdens apply to *all* waste generated outside Michigan. Because only waste generated within a Michigan county may be disposed of in that county without being subject to veto by the county, its municipalities and the State, and

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[17] The state respondents also assert (Br. in Opp. 14-15) that any challenge to the Michigan statute depends upon the particular plans adopted by Michigan's 83 counties, because all of those plans are part of a comprehensive state disposal plan. They ignore that fully 75 of the 83 counties refuse to permit disposal of any out-of-state waste and the remaining 8 permit disposal of waste from a limited number of out-of-state counties. Thus, even under the State's contention that the plans of all counties must be considered, the conclusion is inescapable that the Michigan law as applied has the impermissible effect of reserving substantially all Michigan disposal capacity for Michigan waste generators. Moreover, as we now explain, even if the actions of the counties are ignored, the statute impermissibly discriminates by imposing more onerous authorization procedures for disposal of out-of-county waste.

because out-of-state waste *by definition* is not generated within any Michigan county, it follows that 100% of out-of-state waste receives disfavored status under the Michigan statute. See pages 15-16, *supra*.

To be sure, some waste generated within Michigan is subjected to the same burdens as waste generated outside the state. But, as discussed above (at pages 16-19), *Dean Milk*, *Brimmer*, *Polar Ice Cream*, and *Bacchus Imports* make clear that drawing the disfavored class to include even a substantial percentage of in-state entities cannot save a law that categorically burdens out-of-state entities.

Even if these precedents did not exist, however, the Michigan statute should be subjected to "the strictest scrutiny" because the statute on its face discriminates against out-of-state waste in its practical operation. This Court said over fifty years ago that "[t]he freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate business, whatever may be the ostensible reach of the language." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 457 (1940) (striking down tax on individuals who display samples for purposes of securing retail orders and who are not regular retail merchants in state). As in many of its other cases in which it found a discrimination in practical operation merely from reviewing the legislative scheme in light of common knowledge,[18] the Court need not look beyond the requirements of the Michigan provisions themselves to conclude that they confer privileged status on in-state commerce and relegate out-of-state commerce to an inferior position.

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[18] *E.g.*, *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946); *Best & Co.*, *supra*; *Barber*, *supra*.

Under the Michigan scheme, *all* Michigan waste is relieved of the authorization requirements of the statute with respect to at least one location—the county in which it was generated. By contrast, *no* out-of-state waste may be disposed of anywhere in Michigan unless it receives approval of a county, 67% of the municipalities within the county, and the Michigan Department of Natural Resources. That is blatant discrimination.[19]

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[19] Respondents place considerable reliance on *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), asserting that the Court there upheld against Commerce Clause challenge a state statute that favored in-state users of Nebraska water. In fact, the Court concluded that the statute's restrictions on the export of water did not violate the Commerce Clause because they merely mirrored Nebraska's existing restrictions on in-state users of water. *Id.* at 955-956. The Court further observed that even if the restrictions were not entirely even-handed, special circumstances—including the State's claim of ownership of the water—"may support a limited preference for its own citizens in the utilization of the resource." *Id.* at 956. Because of this historically established quasi-ownership interest, Nebraska's claim was "logically more substantial" than claims made in the Court's other natural resources cases. *Id.* at 956-957. Here, by contrast, neither Michigan nor St. Clair County can plausibly claim any interest in petitioner's waste disposal facility.

Thus, *Sporhase* provides no support for respondents' restrictions on out-of-county waste. Indeed, a part of the decision that respondents downplay affirmatively supports the conclusion that the statute at issue here is unconstitutional. Although upholding certain restrictions on exportation, the Court invalidated Nebraska's facially discriminatory ban on exportation to states that did not permit exportation of water to Nebraska. The Court noted that this reciprocity provision was not "narrowly tailored to [Nebraska's] conservation and preservation rationale." 458 U.S. at 957-958. It explained: "Even though the supply of water * * * may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska." *Id.* at 958. The same can be said of Michigan's statute: Whether or not a particular county has adequate disposal capacity and regardless of the compelling need of communities outside Michigan, the statute presumptively

There can be no question that this difference in treatment constitutes a significant competitive advantage for in-state waste generators. Instead of allowing all communities that generate municipal waste to compete for Michigan disposal capacity on equal terms, Michigan has ensured that each of its counties will be able to exclude all competitors for such capacity until all their own needs (both present and future) are satisfied. And, because counties have the absolute power to exclude out-of-state waste, they become virtual monopsonists—by exercising their veto they can eliminate competition and thereby influence the price they will be charged for disposal capacity. Alternatively, the veto power gives them leverage to demand and receive below market prices in exchange for their permission to receive out-of-state waste.[20]

Communities from outside Michigan that generate identical waste, by contrast, will have to pay a markedly higher price on average than Michigan communities for two related reasons. First, those facility owners who are permitted to receive out-of-county waste will need to charge more to make up for the below market prices they may be forced to accept from the county in which they are located. Second, because there will be increased competition for capacity in the comparatively few facilities that are permitted to accept out-of-county waste, the higher prices that facility owners will have to charge likely will be sustainable.

Viewed from the perspective of the disposal facility operator, Michigan has exercised its regulatory authority to force the operator to deal on favorable terms with in-

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closes each county's borders to waste from other states. That is no more acceptable with regard to waste disposal capacity than it is with regard to water.

[20] Many facility owners already are charging lower prices to communities in which they are located. But the pricing disparity will be less voluntary and grow far wider if counties are given absolute power to exclude competing users of disposal capacity.

county customers while at the same time obstructing his economic relationships with out-of-state customers. This coercive use of state power to force businesses to give in-staters an advantage over out-of-staters necessarily leads to a breakdown of interstate markets. Cf. *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 100 (1984) (plurality opinion) (striking down requirement that timber purchased from Alaska undergo first processing in Alaska before being sent out-of-state).

Thus, by giving counties absolute power to prohibit private disposal facilities from receiving out-of-county waste, Michigan has done precisely what this Court has said the Commerce Clause forbids: "accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *City of Philadelphia*, 437 U.S. at 627.

Moreover, "'[t]he practical effect of [Michigan's] statute must be evaluated not only by considering the consequences of the statute itself, but also by considering * * * what effect would arise if not one, but many or every, State adopted similar legislation.'" *Wyoming* v. *Oklahoma*, slip op. at 15 (quoting *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 336 (1989)). If every state were to enact a law like Michigan's, the discriminatory effect would be even more obvious: virtually all interstate commerce would be subject to regulatory burdens from which a significant amount of in-state commerce is exempted. That is the precise sort of discrimination condemned by the Commerce Clause.

Indeed, as we have discussed (at pages 7-9), the risk of state and local governments emulating Michigan is far from a theoretical one. The cumulative effect of all the different bans and other burdens on out-of-county waste that have been or may be enacted makes the discriminatory nature of such laws crystal clear.

D. The Michigan Provisions At Issue Are Not The Least Discriminatory Means Of Fulfilling Any Legitimate Governmental Interest.

Respondents have asserted several related justifications for prohibiting private disposal facilities from receiving out-of-state waste in the absence of explicit authorization from the county in which they are located. According to respondents, this prohibition is an integral part of the State's requirement that counties assure adequate disposal capacity for their own waste for a 20-year period and serves the purposes of (1) helping counties plan for the duration of the 20-year period by "identifying" the amount of waste projected for disposal; (2) conserving disposal capacity within the county; and (3) ensuring that counties site disposal facilities to meet their capacity assurance obligations. See State Br. in Opp. 34; County Br. in Opp. 11.

Plainly, the goals of ensuring capacity and planning for the future are valid ones. But permitting counties to bar out-of-county waste (including all out-of-state waste) from being disposed of at private facilities is far from the least discriminatory means of accomplishing those goals. The amount of waste to be disposed of can be "identified" without giving counties absolute veto power. All the counties need do is require operators of disposal facilities to specify the amount of out-of-county waste they have contracted to receive.

Nor is an absolute veto necessary to conserve disposal capacity. Michigan plainly is entitled to pursue that end "by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." *City of Philadelphia*, 437 U.S. at 626. See also *Hughes*, 441 U.S. at 337-338 (ban on exportation is "[f]ar from" the least discriminatory means of conserving minnows).

The goal of ensuring disposal capacity for a 20-year period also may be achieved without subjecting out-of-state waste to discriminatory regulation. First, coun-

ties may enter into long-term requirement contracts either with disposal facilities within their borders or elsewhere. But this would require competing in the market for disposal capacity—and paying prices commensurate with such competition. As discussed above, the provisions at issue relieve Michigan counties of the burden of competing in the interstate market by endowing them with absolute power to bar any and all competition. Michigan thus has authorized its counties to claim private disposal facilities for their own citizens by regulatory fiat; by denying operators of such facilities access to any other market, the counties can shift the entire burden of capacity assurance to private parties.

Second, counties conceivably could operate their own disposal facilities on publicly owned land. Several lower courts have held that state and local governments are entitled to give local residents a preferred right of access to government-owned disposal facilities under the "market participant" doctrine. See, *e.g.*, *Swin Resource Sys., Inc.* v. *Lycoming County*, 883 F.2d 245, 248-255 (3d Cir. 1989), cert. denied, 493 U.S. 1077 (1990); *Lefrancois* v. *Rhode Island*, 669 F. Supp. 1204, 1207-1212 (D.R.I. 1987); *Shayne Bros. Inc.* v. *District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984); *County Comm'rs* v. *Stevens*, 473 A.2d 12 (Md. 1984).

The fatal flaw in respondents' approach is that it allows a state or local government to essentially commandeer a local business—using its regulatory authority to cut off that business's access to the interstate market in order to fulfill a local need. Surely a privately owned factory or quarry could not be required to hire only local workers in order to ensure that the local workforce would be employed fully. Cf. *United Bldg. & Constr. Trades Council*, *supra* (striking down such a statute as violative of the Privileges and Immunities Clause). And a timber producer could not be required to sell its goods only to local residents in order to ensure that sufficient timber would be available to allow for a planned expansion of the community. If a state or local govern-

ment wishes to accomplish those goals, it must expend public funds to do so. The Commerce Clause bars states and localities from obstructing a business's access to the interstate market in order to force the business to serve a local need.

Finally, respondents argue that their discrimination is justified by health and safety concerns, contending that the Court invalidated New Jersey's ban on out-of-state waste in *City of Philadelphia* only because it concluded that the health and safety claims advanced by the State were a sham. In fact, the Court found New Jersey's actual motive irrelevant, stating that "it does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution." 437 U.S. at 626. "[W]hatever New Jersey's ultimate purpose," the Court concluded, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-627. See also *New Energy Co.*, 486 U.S. at 279 n.3 (even legislative purpose of protecting public health is "inadequate to validate patent discrimination against interstate commerce"). Here, Michigan has not presented any reason for the more onerous burdens imposed on out-of-state waste other than its place of origin.[21]

In sum, all of the State's legitimate goals could be achieved without discriminating against interstate com-

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[21] The so-called "quarantine" cases are inapplicable here for two reasons. First, the Michigan statute on its face does not impose a quarantine; it does not limit transportation of waste, and permits disposal if the requisite permission is obtained. It is not a law that "prevent[s] traffic in noxious articles, whatever their origin." *City of Philadelphia*, 437 U.S. at 629. Second, as in *City of Philadelphia*, "[t]here has been no claim * * * that the very movement of waste into or through [Michigan or St. Clair County] endangers health, or that the waste must be disposed of as soon and as close to its point of generation as possible. The harms caused by waste are said to arise after its disposal in landfill sites, and at that point * * * there is no basis to distinguish out-of-state waste from domestic waste." *Ibid.*

merce in waste. The provisions at issue accordingly violate the Commerce Clause.

III. THE CONSTITUTIONALLY PROPER APPROACH TO THE WASTE DISPOSAL PROBLEM IS THROUGH CONGRESSIONAL ACTION

Michigan surely is entitled to seek solutions to its waste disposal needs. But the Commerce Clause imposes limits on the range of options from which it may choose. By erecting high barriers against out-of-state waste, Michigan has sought to "isolate itself from a problem common to many" (*City of Philadelphia*, 437 U.S. at 628), thereby subverting the ideal of a national market in which all states "sink or swim together" (*Baldwin*, 294 U.S. at 523). That means is beyond its constitutional power.

The Commerce Clause confers upon *Congress* the power to address issues involving interstate commerce. It is thus *Congress* that has authority to determine the existence, scope, and resolution of national waste disposal problems. Only Congress can ensure a solution that balances all relevant concerns—exporting states' need for a dependable source of supply, importing states' concerns about slowing the flow of waste into disposal facilities within their borders, and the need of the Nation as a whole to encourage siting of and investment in environmentally sound disposal technologies. As part of such a solution, Congress could choose to permit imposition of disparate burdens on out-of-state waste.

Indeed, Congress has been actively considering a wide range of proposals, some of which would encompass differential treatment of out-of-state waste.[22] These pro-

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[22] For example, Congressman Swift, Chairman of the Transportation and Hazardous Materials Subcommittee of the House Energy and Commerce Committee, has introduced legislation (H.R. 3865) that would authorize states to impose differential fees on out-of-state waste or alternatively to restrict volumes of such wastes. An alternative House bill (H.R. 3952) would authorize local governments to ban out-of-state waste. In the Senate, Senator Baucus, Chairman of the Environmental Protection Subcom-

posals have been subjected to plenary hearings. Several interested groups have testified in support of allowing differential treatment of out-of-state waste. Others, including the EPA, environmental public interest groups, and NSWMA, have opposed permitting discriminatory treatment (see pages 10-11, *supra*) and instead have suggested a range of even-handed alternatives. See, *e.g.*, *Senate Hearings*, pt. 2, at 496 (EPA Administrator Reilly) (supporting variable rate pricing).

Thus, Congress has heard all viewpoints on the question whether it should enact an exception from Commerce Clause principles for waste disposal. Until it affirmatively enacts such an exception, however, Michigan must satisfy itself with even-handed measures that do not "accord its own inhabitants a preferred right of access over consumers in other States" (*City of Philadelphia*, 437 U.S. at 627).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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mittee of the Environmental and Public Works Committee, has introduced legislation (S. 976) that would permit states to impose differential fees and authorize bans by states that meet certain criteria. Senator Coats also has introduced legislation (S. 153) that would authorize states to impose differential fees. Twenty-six other bills that address interstate movement of waste were introduced during the last year. See *Federal/State Issues* at 41-44.